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MAR 28 1984
ALEXANDER L. STEVAS
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No. 83-1176

IN THE

Supreme Court of the United States

October Term, 1983

STEPHEN H. DEMAREST,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents

REPLY BRIEF FOR PETITIONER

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1. The government declines to analyze the merits of the cases cited by petitioner, relying almost solely on *Gendron* and the government's June 1975 Motion to Affirm in that case. But while the government argues that the "distinction is without legal significance," it concedes, as it must, that *Gendron* is factually different from this case because Demarest's injuries, unlike Gendron's, were service-connected. Brief in Opposition at 6, n.10.

More importantly, the government's argument that the "majority of cases cited by petitioner antedated *Gendron*" is a frail thread that does not support the government's almost total refusal to evaluate law and precedent. Although some of the cases cited by petitioner were decided before *Gendron*, that merely demonstrates that this Court's summary affirmance in *Gendron* should not be considered by this Court to be controlling or to foreclose plenary review in this case. Indeed, this Court's own conflicting cases predating the summary affirmance in *Gendron* only serve to emphasize the need for this Court now to resolve this conflict. Further, the consensus of the post-*Gendron* cases makes clear that premises of *Gendron* are incorrect and have not been accepted generally in the federal courts in similar contexts. This Court

should not let the government sweep constitutional principles and the rights of veterans under the rug of a summary affirmance.

2. The government places great weight on the paternalistic rhetoric of the *Gendron* district court decision. Brief in Opposition at 4, n.4. This Court has never endorsed those views. Nor should it do so. The denial of the individual's right to use his or her own funds to pay a lawyer and thus to obtain legal counsel is at odds with traditions of fair procedure that are basic to our Constitution. No self-serving assertions of paternalistic purpose should obscure that the challenged statute offends fundamental fairness and due process. Each veteran is entitled to decide for himself or herself whether to retain counsel, accepting the clear advantages and any disadvantages of that decision.

3. The government does not deny that the $10 fee limitation effectively precludes veterans from retaining counsel with their own funds. Although not disputing the increased complexity of many claims, the Brief in Opposition at p. 6 unfairly asserts that such complexity is irrelevant because, or so it argues, petitioner "concedes that his claims were relatively routine," citing the Petition at 11. This argument does not merely ignore the complexities of Veterans Administration procedures and the government's own extensive reliance on counsel in the claims process. See Petition at 13. It also distorts and misuses petitioner's statement. The Petition stated: "Even in relatively routine disability cases like that of Demarest, *many complex issues of regulatory law and proof are presented* . . . ." Petition at 11.

4. The government argues that this Court should defer to pending legislation, but it is this Court's responsibility to declare that the existing statute offends due process. To be sure, as the government urges, Congress has the power to revise the offending statute. But it cannot be disputed that Congress–for complex political reasons–continues to be unable to resolve this archaic anomaly.

5. A grateful Nation should not select out disabled veterans for a denial of retained counsel. Indeed, except for veterans with disability claims before the Veterans Administration, all those who contest government action in other agency proceedings take for granted the right to retain their own counsel and to pay for such counsel with their own funds. One surely must wonder why disabled veterans alone are singled out for deprivation of this important right of choice available to all others in administrative proceedings. Such a lack of fair treatment to those citizens who have most selflessly served their country's best interest is a disservice to the veterans, to each of us and to the Constitution of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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